Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

SUPPLEMENT TO BRIEF FOR RESPONDENT.

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SUPPLEMENT TO BRIEF FOR RESPONDENT.

I. Purposes of This Supplemental Brief.

At the hearing of this case, on March 7, 1947, the Court granted the respondent leave to file this Supplement to its printed brief, in support of two propositions advanced in its oral argument.

1. *To resolve a seeming contradiction, raised by the opposing briefs, concerning the Board's decisions in cases involving "watchmen" between 1935 and 1942.*

One of the respondent's two propositions related to an apparent contradiction between the assertion made at page 59 of its brief that:

> "From 1935 until 1942, * * * the Board invariably classified police officers having duties of the character * * * described in this record, as agents of management, who must be excluded from the jurisdiction of rank and file unions. * * *"

—on the one hand, and, on the other, the assertion, made in the Labor Board's printed brief, elaborated in its oral argument and documented by a list of 106 election orders made by the Board between 1937 and 1944, to the effect that (Board's brief, p. 47):

> "The * * * Board, in more than a hundred cases, has expressly included guards or watchmen in units of production and maintenance employees."

In oral argument the respondent stated that its examination of the Board's reports of the 106 cases, so listed on pages 47-50 of the Board's brief, had shown that the Board's assertion was not in fact a contradiction of the respondent's argument: that the Board's list had included many cases in which no question of drawing a line between management and labor had been raised, considered or decided; and that, although the list included cases involving many other kinds of "watchmen," no such case, decided before 1943, referred to or decided the status under the National Labor Relations Act of police officers having duties of the character de-

scribed in this record, and stipulated by the Board. The first purpose of this Supplemental Brief is to furnish a digest of the cases on the Board's list, which is intended to support the Respondent's assertions.

2. *To show that the respondent's present contention, that a single union cannot represent both rank and file labor and agents of management, was raised before the Board.*

The second and other purpose of this paper is to furnish references, more particular and specific than those contained in the original Brief for Respondent, to the points in the Board's own record of the case which show that the respondent raised before the Board the contention (one of those on which it relies here, and one not raised in the *Packard Motor Car Co.* case) that no single labor union can, under the Act, command recognition as exclusive representative of both the rank and file labor in a steelworks, and, at the same time, of policemen or foremen or any of the other agents through whom the authority of management is expressed and enforced as against the rank and file.

II. The Cases Cited by the Board Do Not Refute the Respondent's Contention That, Prior to 1943, the Board Excluded Policemen of the Kind Here Involved from the Jurisdiction of Rank and File Labor Unions.

1. THE BOARD'S LIST OF 106 CASES.

(a) CASES IN WHICH THE POINT INVOLVED HERE WAS NOT RAISED BY THE EMPLOYER OR CONSIDERED BY THE BOARD.

In nineteen of the 106 cases on the Board's principal list, the Board's inclusion of "watchmen" in bargaining or voting units of rank and file labor was taken as a matter of course by the employers, and the question here involved was not considered by the Board. Only one of these cases involved what the Board calls "deputized" guards: that of the *Solvay Process Company*, No. 17, *infra*, in which three guards, evidently night watchmen, held police commissions. As policemen, these three apparently dealt with the general public, rather than with rank and file labor. There is no reason to believe that any of the "watchmen" in any of the nineteen cases was called upon to enforce any rule or policy of management against rank and file workers. The nineteen cases are the following:

1. *Westinghouse Airbrake Company*, 4 N.L.R.B. 403 (1937). A force of twenty-five or thirty "watchmen" were permitted to vote in a unit including a much large number of rank and file laborers, in a rather large manufacturing plant, located in a populous suburban district. The "watchmen," unlike the police in this case, were neither guards nor police officers, were not armed, had no municipal or official status, and had no supervisory, monitorial or managerial relation to the rank

and file. They were stationed at gates and maintained a fire patrol.

2. *Sweet Candy Company,* 5 N.L.R.B. 541 (1938). A few "watchmen" were permitted to vote in a Board election, with other rank and file employees in a small candy factory. They were probably night watchmen; but their duties are not described, except to show that they were not "supervisory." The Board accepted (p. 544) the parties' view of their status.

3. *J. G. McDonald Chocolate Company,* 5 N.L.R.B. 547 (1938). In another small candy factory, a few "watchmen" were included in a "unit" of rank and file labor, as in the preceding case.

4. *Singer Manufacturing Co.,* 8 N.L.R.B. 434 (1940). "Watchmen" were included in a unit of 890 rank and file workers in a plant devoted to the manufacture of sweepers. The numbers and duties of the "watchmen" are not described, except that the Board's decision states that they resembled those of the rank and file laborers in the "unit."

5. *Libbey-Owens-Ford Glass Company,* 10 N.L.R.B. 1470 (1939). "Watchmen" were included, without discussion, in the rank and file "unit" in window glass manufactories. The report discloses neither their numbers nor their duties.

6. *American Petroleum Co.,* 12 N.L.R.B. 688 (1939). "Watchmen" were treated as members of the rank and file in a small oil refinery, without any disclosure of their numbers or duties.

7. *LaPlant-Choate Mfg. Company,* 13 N.L.R.B. 1228 (1939). A few "watchmen"—numbers and duties

not stated—were included without discussion in a rank and file "unit" of 320 individuals employed in a small plant building heavy machinery.

8. *Theurer Wagon Works, Inc.*, 18 N.L.R.B. 837 (1939). Night watchmen — having no managerial authority—were included without comment in the rank and file unit in small automotive body repair shops.

9. *French Paper Company*, 22 N.L.R.B. 1054 (1940). A small group of "watchmen" in a paper mill were included without discussion in a rank and file election "unit" of 116 laborers.

10. *Brown Shoe Company*, 22 N.L.R.B. 1080 (1940). The "watchmen" in a shoe manufacturing plant were treated as rank and file labor, without discussion or disclosure of their numbers or duties.

11. *West Kentucky Coal Company*, 24 N.L.R.B. 863 (1940). The "watchmen" on an inland river coal dock were included, without any discussion, in an election "unit" of seventeen longshoremen.

12. *Gettysburg Furniture Co.*, 25 N.L.R.B. 1109 (1940). The "watchmen"—duties not disclosed—in three small furniture factories were, without discussion, treated as rank and file labor, for the purposes of an election. It appears that they had previously been represented by the rank and file union.

13. *Moulton Ladder Mfg. Company*, 27 N.L.R.B. 40 (1940). "Watchmen" were included, without discussion, in an election "unit" of the 63 rank and file laborers employed in a small wood-working shop.

14. *Rickert Rice Mills, Inc.*, 27 N.L.R.B 466 (1940). The "watchmen" in a rice-processing plant

were included, without any discussion in an election "unit" of 113 rank and file laborers.

15. *Eagle Oil and Refining Company*, 27 N.L.R.B. 1003 (1940). Two "watchmen" in a small oil refinery were, without disclosure of their duties, treated as rank and file labor, for the purposes of an election.

16. *American Cyanimid Co.*, 27 N.L.R.B 1176 (1940). "Watchmen" in a chemical plant were included in a rank and file unit of 174 men, without any discussion, in an election order.

17. *Solvay Process Company*, 30 N.L.R.B. 264 (1941). Of a small group of laborers classified as "watchmen" in a small stone quarry in Trenton, New Jersey, three were commissioned as special city policemen. They and the others in the group had other duties, such as the work of servicing steam shovels, at nights and during week-end shutdowns. It does not appear that they had any duty of control over rank and file labor; instead, the report suggests that their police status was a precaution against injuries to or by trespassers upon the quarry premises, during off hours. No party objecting, they were included in a rank and file election "unit."

18. *Farmington Shoe Mfg. Company*, 41 N.L.R.B. 169 (1942). The "watchmen" in a shoe factory were included in a rank and file election "unit," without disclosure in the decision of their numbers or duties.

19. *Gibbs Gas Engine Co.*, 42 N.L.R.B. 272 (1942). The "watchmen" in a shipyard were treated as rank and file labor in an election case, without discussion of their numbers or duties. The employer had previously recognized a union as their representative.

(b) CASES IN WHICH ALL PARTIES STIPULATED THAT THE BOARD SHOULD TREAT "WATCHMEN" AS RANK AND FILE LABOR.

In forty-seven of the Board's collection of 106 cases, the parties stipulated, and so urged upon the Board, that the individuals described as watchmen should be treated as members of the rank and file.

In the Board's reports of these cases, the duties of the "watchmen" are rarely discussed. This is to be expected, for the stipulations of the parties were intended to avoid any discussion, and to indicate that it was wholly unnecessary. But such circumstances as are disclosed by the reports, all show that the "watchmen" in these forty-seven cases were never subject to be considered as essential agents of managment in its dealings with the rank and file. In a large majority of the forty-seven cases, they were merely night watchmen, usually employed in very small shops or factories, whose work was done at times when the rank and file were absent, and when it was necessary only to guard the employer's premises against fires and trespassers. None of these cases involved "deputized" watchmen, or men having any public duties, as police or otherwise. The cases are as follows:

20. *Clifton Mfg. Company,* 9 N.L.R.B. 13 (1938). "Watchmen" were treated as rank and file labor in a cotton mill election case. Their numbers and duties are not disclosed.

21. *Alaska Juneau Gold Mining Co.,* 9 N.L.R.B. 755 (1938). "Watchmen"—numbers and duties undisclosed —were treated as rank and file labor in a gold mine election.

22. *Lincoln Mills of Alabama,* 9 N.L.R.B. 778 (1938). "Watchmen" in a cotton mill were permitted to vote in a rank and file election—their numbers and duties are not given.

23. *Hawthorne Paper Company,* 12 N.L.R.B. 43 (1939). "Watchmen" in a small paper mill were included in a rank and file election "unit." No further details are disclosed.

24. *The Ohio Brass Company,* 13 N.L.R.B. 72 (1939). "Watchmen"—numbers and duties not disclosed—were included in a rank and file election "unit" in a small pottery.

25. *Vanadium Corporation of America,* 13 N.L.R.B. 836 (1939). Four "watchmen" in a small steel tool plant were included by agreement in a "unit" certified by the Board. Their duties were not described.

26. *Coos Bay Lumber Co.,* 14 N.L.R.B. 1206 (1939). "Watchmen" were included in a rank and file unit of 430 men, in a lumber yard election. Their numbers and duties were not described.

27. *Armour & Co.,* 15 N.L.R.B. 268 (1939). "Watchmen" were included, without any discussion, in a rank and file "unit" of 620 men in an abattoir.

28. *Kelsey-Hayes Wheel Co.,* 16 N.L.R.B. 580 (1939). "Watchmen" in an auto parts plant were included, without discussion of their duties or numbers, in a rank and file election. In prior years, the rank and file union had represented them.

29. *Newark Rivet Works,* 18 N.L.R.B. 520 (1939). Although they had been excluded by an earlier order of the Board, the "watchmen' in a small hardware manu-

factory were included in a rank and file election "unit" at the request of all parties.

30. *Blue Bell-Globe Mfg. Company,* 22 N.L.R.B. 961 (1940). "Watchmen" in a shop manufacturing garments were included in a rank and file election "unit" without any discussion of their numbers or duties.

31. *Shaw Lumber Company,* 28 N.L.R.B. 818 (1940). "Watchmen" on a timber tract were included in a rank and file election "unit" of 246 men, without any discussion of their numbers or duties.

32. *Saticoy Lemon Association,* 28 N.L.R.B. 1214 (1941). "Watchmen" in a small fruit packing house were treated as rank and file labor, without discussion of their duties.

33. *Gutmann and Company, Inc.,* 30 N.L.R.B. 1 (1941). "Watchmen" were treated as rank and file labor in an election in a leather tannery. Nothing was said of their numbers or duties.

34. *The Mary Leila Cotton Mills, Inc.,* 30 N.L.R.B. 238 (1941). "Watchmen" employed at a cotton mill were included in a rank and file election "unit" of 312 individuals, without any description of their numbers or duties.

35. *Libbey-Owens-Ford Glass Co.,* 31 N.L.R.B. 243 (1941). "Watchmen"—evidently night watchmen—in a small glassworks were treated as members of the force of 134 rank and file laborers, for the purposes of an election, without any discussion.

36. *Mack-International Motor Truck Co.,* 31 N.L.R.B. 424 (1941). "Watchmen"—their numbers and duties not disclosed—were included in small election

"units" of "service employees," in six motor truck assembling plants.

37. *Moulton Ladder Mfg. Company,* 31 N.L.R.B. 665 (1941). In a second election in the small wood-working plant involved in case No. 13, *supra,* "watchmen" were included in a unit of 70 rank and file laborers, again without any discussion of their numbers or duties.

38. *American Cyanimid & Chemical Corp.,* 31 N.L.R.B. 883 (1941). "Watchmen" were included in a "unit" of the forty-two rank and file employees in a small chemical plant. Their numbers and duties were not discussed.

39. *Jerry and Edythe Belanger,* 32 N.L.R.B. 1276 (1941). "Watchmen" in a small shop making aluminum castings, were included without discussion in an election "unit" of the fifty-five rank and file employees.

40. *Whiterock Quarries, Inc.,* 33 N.L.R.B. 145 (1941). "Watchmen" at a quarry were treated as rank and file labor, in an election case, without discussion of their numbers or duties.

41. *Turner Day & Woolworth Handle Co.,* 33 N.L.R.B. 1220 (1941). Three "watchmen" employed in a small wood-working plant were included, without any comment, in an election "unit" of sixty-nine rank and file laborers.

42. *Bryce Brothers Co.,* 34 N.L.R.B. 255 (1941). Night watchmen in a plant making expensive glassware were included, without discussion of their numbers or duties, in a rank and file election "unit."

43. *The Lehon Co.,* 34 N.L.R.B. 313 (1941). "Watchmen" included without any statement of number

or duties in a unit of 108 production and maintenance employees in a roofing factory.

44. *Sullivan Mining Company,* 36 N.L.R.B. 107 (1941). "Watchmen"—their numbers and duties not specified—were included in an election "unit" of 309 employees of a zinc refining plant.

45. *Tucker Duck and Rubber Co.,* 36 N.L.R.B. 132 (1941). A few "watchmen," duties not specified, were included in an election "unit" of 79 rank and file laborers, employed in three small upholstery fabric factories.

46. *Ideal Seating Co.,* 36 N.L.R.B. 166 (1941). "Watchmen" were included without any discussion in a "unit" of the ninety-eight rank and file workers in a small theatre seat factory.

47. *Fruit Growers' Supply Co.,* 36 N.L.R.B. 959 (1941). "Watchmen" were included, without mention of their numbers and duties, in a "unit" of the 180 rank and file laborers in a small, fruit box factory.

48. *Indiana Brass Company,* 36 N.L.R.B. 967 (1941). "Watchmen" were included, without disclosure of their numbers or duties, in an election "unit" of the 225 rank and file employees in a small brass foundry.

49. *Sculler Safety Corp.,* 36 N.L.R.B. 1160 (1941). "Watchmen" were included without any discussion in a "unit" of the seventy or eighty rank and file employees, in a small factory, building life rafts.

50. *John Yasek,* 37 N.L.R.B. 156 (1941). "Watchmen" were included, without discussion, in a "unit" of the twenty-nine rank and file workers employed in a lumber operation in Oregon.

51. *Burton-Dixie Corp.*, 37 N.L.R.B. 432 (1941). "Watchmen" were included, without mention of their numbers or duties, in a rank and file election "unit" in a bedding manufactory.

52. *Peerless Novelty Company*, 37 N.L.R.B. 622 (1941). A "unit" of all hourly and piece rated employees, in a small factory, 100 to 129 in number, included "watchmen," who were not otherwise identified or discussed.

53. *Link-Belt Speeder Company*, 37 N.L.R.B. 889 (1941). "Watchmen," whose number and duties were not stated, were included in a "unit" of all of the 218 non-supervisory employees in a small machine-tool shop.

54. *South Portland Shipbuilding Corp.*, 39 N.L.R.B. 485 (1942). It was agreed by all parties, and so ordered by the Board, that a "unit" of "hourly paid production and maintenance workers" in a shipyard should include "guards and watchmen." The number and duties of these men were not stated.

55. *MacAndrews & Forbes Co.*, 39 N.L.R.B. 699 (1942). Being urged by the employer to do so, the Board included "watchmen," "laborer-watchmen" and "guards" in a "unit" of about 500 rank and file employees in a licorice extract plant. The decision carefully describes the men so included, as unarmed night watchmen and gate keepers, having no official or managerial authority.

56. *Philip Carey Mfg. Co.*, 39 N.L.R.B. 769 (1942). "Watchmen" employed by a toy or novelty manufacturer were included, without mention of their numbers or duties, in a "unit" of about 1,290 rank and file workers.

57. *Superior Coach Corp.*, 39 N.L.R.B. 926 (1942). "Watchmen" were included, without any statement of their numbers or duties, in a "unit" of rank and file laborers employed in an automotive bus body shop.

58. *Pacific Gas & Electric Co.*, 40 N.L.R.B. 591 (1942). "Watchmen" employed by a public utility company were included in a rank and file election. The report does not disclose their numbers or duties, but does show that the employer favored their inclusion, and that they had been included in the rank and file bargaining unit in the past.

59. *Republic Creosoting Co.*, 40 N.L.R.B. 615 (1942). "Watchmen" were included, without any statement of numbers or duties, in a "unit" of the eighty-seven rank and file employees in a small creosoting plant.

60. *McKesson & Robbins, Inc.*, 42 N.L.R.B. 1297 (1942). "Watchmen" were included, without any statement of their numbers or duties, in a unit of 120 warehouse employees. They had been included in rank and file labor contracts in the past.

61. *New Indiana Chair Co.*, 43 N.L.R.B. 318 (1942). Three "watchmen" were included, without any statement of their duties, in a unit of 108 production, maintenance and shipping employees in a small chair manufactory.

62. *Baer Bros.*, 43 N.L.R.B. 1267 (1942). "Watchmen" were included in a unit of 59 production and maintenance employees in a small paint factory. Previous labor contracts had included them with rank and file laborers.

63. *A. P. Steiner,* 43 N.L.R.B. 1384 (1942). Two "watchmen" neither deputized nor armed, both of whom also performed maintenance duties, were included in a unit of production and maintenance men in a small machine, tool and die shop.

64. *Luders Marine Construction Co.,* 44 N.L.R.B. 214 (1942). "Watchmen" and "plant guards" were included without any statement of number or duties in a unit of rank and file employees in a boat yard.

65. *Farrar & Trefts, Inc.,* 44 N.L.R.B. 678 (1942). "Watchmen" were joined, without any statement of numbers or duties, in a unit of 141 production and maintenance employees in a tank and boiler works.

66. *E. I. duPont deNemours & Company,* 69 N.L.R.B. 509 (1946). Fifteen "plant guards", neither armed, militarized nor deputized, and whose duties were not related to the control of the conduct of their fellow workers, were included in a rank and file election "unit" of a lacquer finish plant, in accordance with previous bargaining history in the plant. This case was decided after the Board had abandoned its original line between management and labor.

(c) CASES IN WHICH THE BOARD'S ACTION WAS CONTESTED.

In the remaining forty of the Board's list of 106 cases, the proposed inclusion of "watchmen" in rank and file election units was the subject of contest by some party or parties, and so of particular comment or explanation by the Board.

Because the status of the "watchmen" involved in these forty cases was the subject of question or contro-

the Board's reports usually describe their duties in more detail that that supplied by the reports of the preceding cases, in which the matter of status was not reached for consideration. The descriptions show that in none of the forty cases were the "watchmen" charged with managerial or public duties of the characters imposed on the Jones & Laughlin Steel Corporation's Otis Works police. In almost all of the forty cases, the men involved were simple, unarmed night watchmen. In two cases: No. 74, *infra, Willys-Overland Motors, Inc.* and No. 81, *infra, Solvay Process Co.*, they were deputized—or some of them were; but in neither case were their duties, as the Board describes them, similar in any material respect to those of the Otis Works police.

These forty cases, as a group, are in point here only because they maintain, in a left-handed way, the contention here relied upon by the respondent: in each case where the least occasion existed, the Board justified its inclusion of "watchmen" in rank and file "units" by showing the absence of any regular duty to exercise managerial or public authority over the rank and file. The cases are the following:

67. *Holland-Rieger Division, Apex Electric Co.*, 6 N.L.R.B. 156 (1938). A few "watchmen" employed in a small electric appliance factory were included in an election "unit" of 367 rank and file employees, with the assent of two unions, and against the employer's objection. The numbers and duties of the watchmen were not stated, but it appears that they discharged no managerial function, as against rank and file labor. The decision turned largely on the fact that one of the unions had represented them, or some of them, for more than a year.

68. *American Hair and Felt Co.*, 6 N.L.R.B. 648 (1939). Six or seven "watchmen" were included in a rank and file "unit" of 485 employees in a small plant making felt products, with the approval of two unions, and over the employer's objection. Their duties were those of night watchmen or gatemen, and involved no exercise of authority over the rank and file.

69. *Aluminum Ore Co.*, 8 N.L.R.B. 914 (1938). Nineteen "watchmen" and "gatemen" at an alumina refining plant were included in a rank and file certification. It does not appear that they were armed or uniformed, or that they had any managerial duties or any official status.

70. *The Electric Auto-Lite Co.*, 9 N.L.R.B. 147 (1938). "Watchmen" were included in a rank and file election unit in an automobile parts plant, in reliance upon the decision in *re Luckenbach Steamship Co., Inc.*, 2 N.L.R.B. 181, a case to be discussed later in this brief. The report does not state their numbers or duties, but it does not appear that they had either managerial or official status.

71. *Merrimack Mfg. Co.*, 9 N.L.R.B. 173 (1938). "Watchmen" in a textile plant were included in a rank and file "unit." Their duties were those of night watchmen: to exclude trespassers, to watch for fires, to fire furnaces, and to switch lights off and on.

72. *A. Fink and Sons Co., Inc.*, 9 N.L.R.B. 441 (1938). "Watchmen" were included, over the employer's objection, in a rank and file "unit" of 303 employees in a small meat packing plant. The report contains no statement of their numbers or duties, but the circumstances indicate that they were night watchmen or gatemen.

73. *Consumers' Power Co.*, 9 N.L.R.B. 742 (1938). Janitor-watchmen employed in the power plants of a utility company were included in a rank and file "unit." Those employed in the company's offices were excluded. None of these men had any managerial duties or any official status.

74. *Willys-Overland Motors, Inc.*, 9 N.L.R.B. 924 and 937; 10 N.L.R.B. 160 (1938). In an effort to avert a strike of the 2,880 employees in the Toledo plant of this automobile manufacturer, the Board ordered an election, lumping in one "unit" with the rank and file workers certain foremen and assistant foremen, and also a group of thirty-seven watchmen, over the employer's objection. Of the "watchmen," the Board said, without further explanation, "They act as gatemen and night watchmen and some of them are deputy sheriffs or special policemen," and observed that the union in the case had long been recognized as their representative. It does not appear that these "watchmen" were responsible to enforce either company rules or public laws against the rank and file.

75. *Pacific Mills, Cocheco Division*, 10 N.L.R.B. 26 (1938). "Watchmen" were included in a "unit" of 1500 rank and file employees in a textile plant, over the employer's objection. They had no public status, and evidently no managerial or monitorial duties: they performed the work of night watchmen, plus "an amount of police service, principally when the plant is shut down."

76. *Illinois Knitting Co.*, 11 N.L.R.B. 48 (1939). Three "watchmen" were included in a "unit" of the 120 rank and file laborers in a small knitting mill, over the employer's objection. Their status and duties were in-

distinguishable, for this purpose, from those of other rank and file workers.

77. *Naumkeag Steam Cotton Co.*, 13 N.L.R.B. 513 (1939). "Watchmen" in a cotton mill and bleachery were included without any statement of their numbers or duties, in a unit of production employees where two unions desired their inclusion. Despite the Board's recognition that

> "* * * the position of the watchmen is such as to identify them somewhat more closely with the management than other employees, * * *"

it does not appear that these watchmen discharged any managerial or public functions.

This decision was based on *Luckenbach Steamship Company, Inc.*, 2 N.L.R.B. 181, a case to be discussed later in this brief.

78. *Westinghouse Electric & Mfg. Company*, 23 N.L.R.B. 521 (1940). "Watchmen" were included in a "unit" of the 147 rank and file employees of a small electric lamp factory. Their numbers and duties are not described, but the report implies that they had no managerial or public duties.

79. *Lee Rubber and Tire Corporation*, 24 N.L.R.B. 1077 (1940). Eight "watchmen" employed in an automobile tire manufactory were included in a "unit" of 791 rank and file employees. The report indicates that they had no managerial or public duties.

80. *Southern Cement Co.*, 28 N.L.R.B. 596 (1940). "Watchmen" in a cement plant were included in a "unit" of 125 rank and file employees. The report indicates that they had no public duties and no managerial

authority — that they were night watchmen and messengers.

81. *Solvay Process Co.*, 29 N.L.R.B. 24 (1941). "Deputized watchmen" in a chemical plant were included in a "unit" of 835 rank and file employees, at the instance of the employer and one labor union and over the objection of a second labor union. They were so included because they had been represented by the former union for over two years previously. It does not appear that any of their duties to the employer were incompatible with such representation, since no such question was raised by any party.

82. *Trojan Powder Co.*, 29 N.L.R.B. 229 (1941). Four "watchmen-guards," serving as gatemen and janitors, were included in a "unit" of 53 rank and file employees of a powder plant. They had no managerial or public authority or status.

83. *Pullman-Standard Car Mfg. Co. (Haskell and Barker Plant)*, 29 N.L.R.B. 600 (1941). Thirteen "watchmen" were included in a rank and file unit in a railroad car building plant. Their sole duties, as watchmen, were to protect the plant against fires and trespasses during shutdowns. They had no public status.

84. *Continental Mills*, 30 N.L.R.B. 82 (1941). Seven "watchmen," doing the work of gatemen and night watchmen, were included in a "unit" of 916 rank and file employees in a flour mill.

85. *The National Copper and Smelting Co.*, 30 N.L.R.B. 973 (1941). The two "watchmen" in a copper mill were included in a "unit" of 140 rank and file workers. Their duties were those of "yard labor."

86. *Goodrich Electric Co., Inc.*, 30 N.L.R.B. 979 (1941). The "watchmen" in a small electric supply factory were included in a "unit" of 230 rank and file workers. Their duties were those of maintenance laborers or caretakers.

87. *General Chemical Co.*, 31 N.L.R.B. 413 (1941). "Watchmen" whose only stated duty was handling dangerous chemicals were included at request of a union in a "unit" of 90 production and maintenance employees in a small chemical plant.

88. *Westinghouse Electric & Mfg. Company*, 32 N.L.R.B. 274 (1941). Five "watchmen" in a small electric supply manufactory were included in a rank and file "unit" of about 400 men, over the employer's objection. Although their duties are not described, the Board's report implies that they had no public or managerial status.

89. *The Quaker Oats Company*, 32 N.L.R.B. 312 (1941). The status of "watchmen" in the breakfast cereal factory involved in this case was not decided by the Board, nor were their numbers or duties described. Three unions presented different plans to the Board, the employer accepted neither proposal, and the Board determined to reserve its decision pending the outcome of a series of elections.

90. *Robins Dry Dock & Repair Co.*, 33 N.L.R.B. 15 (1941). Without stating their numbers, the Board included watchmen in a rank and file unit, although one labor union and the employer objected. The Board said:

> "*Watchmen* are engaged in tending gates, patrolling, ringing clocks, and in fire detection. They are hourly paid and not on the 'shape-up.'

Local 39 and the Association desire their inclusion and the Company and the Council their exclusion. We shall include them in the unit."

91. *Houde Engineering Corp.*, 36 N.L.R.B. 587 (1941). As in case No. 90, the employer and one union objected, but the Board included "watchmen" in a rank and file "unit." The report does not describe the "watchmen's" duties or status, except to say that:

> "There are 22 watchmen consisting mostly of elderly or disabled men formerly employed by the Company in other positions. They are included in the present contract between the Company and the Association and have been included in previous contracts with the Association over a period of 8 years. In the light of this established bargaining practice, we shall include the watchmen in the appropriate unit."

92. *Arkwright Corp.*, 36 N.L.R.B. 687 (1941). Although the employer and one union objected, "watchmen" in a textile plant were included in a rank and file "unit." Their numbers and duties were not stated, but it appears that they can have had no managerial authority or public status.

93. *Diamond Crystal Salt*, 37 N.L.R.B. 481 (1941). Six "watchmen" in a salt works were included in a "unit" of 317 rank and file workers over the employer's objection. The report shows that they were night watchmen, having no duty to control the rank and file and no public status.

94. *F. M. Bohannon Tobacco Co.*, 37 N.L.R.B. 526 (1941). This case resembles No. 93, in that the three "watchmen" included in the rank and file unit, over the

employer's objection, were employed to guard the plant, and to do certain maintenance labor, at night and on week-ends, when the other rank and file workers were not present. They had no public status.

95. *The Edwards Valve & Mfg. Company,* 38 N.L.R.B. 428 (1942). In this case the Board included in a rank and file unit of 190 men, over the employer's objection, a small class of night watchmen-janitors having no managerial or public responsibilities.

96. *Little Rock Furniture Mfg. Co.,* 39 N.L.R.B. 892 (1942). In this case, as in the two preceding cases, the "watchmen," included in a rank and file unit against the employer's objection, were employed simply to exclude trespassers and to keep fires during night and week-end shutdowns; and had no duties to control the rank and file or to enforce the law.

97. *The American Brake Shoe and Foundry Co.,* 41 N.L.R.B. 82 (1942). This case involved three night watchmen like those of the three preceding cases: men having no public or supervisory duties, not armed or uniformed, not trained as police, and not entrusted with any confidential duties. Only 77 men were in the unit.

98. *Lookout Oil and Refining Co.,* 42 N.L.R.B. 560 (1942). In this case, again, the "watchmen" were typical night watchmen having no public or supervisory duties, employed in a cotton seed oil plant. They were included in the rank and file "unit" of 137 men, with the employer's approval, but over the objections of both of the competing labor unions.

99. *Flintkote Co.,* 42 N.L.R.B. 929 (1942). "Watchmen" employed in a roofing manufactory were included in a "unit" of 330 rank and file workers over

the employer's objection. Their duties were those of night watchmen—to exclude trespassers and detect fires, and included no managerial authority or public responsibility. They had previously been represented by the union. At request of the Government three men had been deputized but no material change in their duties was effected thereby.

100. *Hamrick Mills*, 44 N.L.R.B. 238 (1942). Seven "watchmen" in a cotton mill were included in a "unit" of 381 rank and file workers over the employer's objection. The report shows that they had no duty to enforce company rules and no public status. They were, it appears, simply armed night watchmen.

101. *North Carolina Finishing Co.*, 44 N.L.R.B. 681 (1942). "Watchmen" employed in a cotton goods mill were included in a rank and file "unit" with the employer's approval, but over the objection of the union. They were night watchmen and gatemen, and were included accordingly because, as the Board observed, "their duties appear to be those customarily performed by watchmen rather than those of a specialized plant protection force."

102. *Colorado Portland Cement Co.*, 45 N.L.R.B. 197 (1942). In this case, as in the several preceding cases, the three "watchmen," in a cement mill, were included in a "unit" of approximately 136 rank and file employees, because their duties were simply those of night watchmen. One union desired their inclusion; another union and the employer objected.

103. *Gluck Bros. Inc.*, 45 N.L.R.B. 1159 (1942). Four "watchmen" employed to guard a furniture plant against intruders and fires, during nightly shutdowns—night watchmen, having no managerial or public au-

thority—were included in a rank and file unit of 165 men against the employer's objection.

104. *Bell Telephone Laboratories,* 55 N.L.R.B. 87 (1944). This case, and Nos. 105 and 106, *infra,* are unimportant to the respondent's argument, because they were decided since the Board's abandonment, in 1943, of its original interpretation of the Act. Apart from that, this case is of no support to the Board's argument, for the Board dismissed the petition without passing upon the status of the watchmen.

105. *Commonwealth Edison Co.,* 55 N.L.R.B. 732 (1944). In this case the employer's petition sought the inclusion of a force of demilitarized plant guards in a rank and file unit. It does not appear that the guards had any managerial status: they were either gate watchmen, or men engaged in patrolling an electric power system in radio-equipped automobiles, to prevent damage by trespassers; and they had no public status after their demilitarization.

106. *Luscombe Airplane Corp.,* 69 N.L.R.B. 479 (1946). In this very recent case, seven watchmen in an airplane factory were included in a rank and file "unit" against the employer's opposition. They had no public status, and no managerial or monitorial duties, it appears, except to check packages at the plant gates.

2. THE OTHER LISTS OF CASES REFERRED TO IN THE BOARD'S ARGUMENT.

In the Board's oral argument, it was stated generally that the list of 106 cases, which have been digested, is reinforced by other lists submitted here and in the Court below at various stages of the case. But

the long list attached to the Board's petition for rehearing in the Court below (R. 107) and the long list attached to the Board's petition for certiorari at No. 1237 October Term, 1944, are not in point at present, because they are simply catalogues of the decisions which followed chronologically the Board's decision, in the case of *Chrysler Motor Corporation,* 44 N.L.R.B. 881, published late in 1942, to depart from its long-standing adherence to the traditional rule of the managerial status of such policemen as are involved here. It is true also, as is observed in the Brief for Respondent, that in only a minor fraction of these cases — undoubtedly those in which the union status given the guards or watchmen was unimportant to the employer—has the Board's new rule been accepted by the parties concerned, and that in no cases prior to this one has the Board attempted by judicial process to enforce the new rule against anyone.

3. THE CASE OF THE LUCKENBACH STEAMSHIP COMPANY, 2 N.L.R.B. 181 (1936); 10 N.L.R.B. 1355 (1939); AND 19 N.L.R.B. 623 (1940).

To complete any discussion of the cases relied upon, in the Board's oral argument, to sustain its position that the Board has always treated plant guards and police as rank and file labor—and that there is, as a result, no room for application here of the doctrine of settled administrative construction—it is probably necessary to consider the Board's decisions in the case of the *Luckenbach Steamship Company, et al.*

The *Luckenbach* case was relied upon in the Board's oral argument, and two of the Board's three reports of it are described in some detail, on pages 58 and 59 of the Board's brief, as authorities for the Board's

proposition just described. But if the entire history of the case be considered, it will be seen that it does not, in the end, support the Board's view of the issue now under discussion.

In *Luckenbach Steamship Company,* 2 N.L.R.B. 181 (1936), the Board considered a petition of the International Longshoremen's Association for certification as exclusive representative of several large classes of individuals employed on the docks in San Francisco, by the owners of substantially all of the ocean-going steamship lines operating out of that port. Amongst the employees so claimed by the Union were "watchmen" of three classes. Each watchman was employed by some one steamship company; and it was the duty of watchmen in one of the three classes to patrol docks at which their employer's ships were moored, and to guard their employer's property against fires, and against thefts and other irregularities. Some of the watchmen in this class were special police officers of the City of San Francisco. The employers objected to their inclusion in the election "unit," on grounds resembling those here relied upon by the respondent Jones & Laughlin Corporation; but the Board nevertheless issued an election order which lumped them with the rank and file.

In *American-Hawaiian Steamship Company,* 10 N.L.R.B. 1355 (1939)—a further proceeding in the same case—it appeared that in the Board's election a majority of the voters had favored the I.L.A., the Union in the case; and that the Board had certified the Union as exclusive representative of the entire "unit." Some of the ship owners (principally those who had no need for the services of deputized policemen) had accepted the Board's certification, but the larger companies, those who

employed and relied upon the private municipal police, had refused to recognize the Union. The police themselves had intervened in the matter, reported their dissatisfaction with the Board's original plan, and sought to be released from the jurisdiction of the Union. The employers renewed their original objections. The Union contended that the desires of the police should be ignored, and that the Board's certification should be enforced. Although its Trial Examiner recommended the exclusion of the private policemen from the Union's jurisdiction, the Board, rejecting his recommendation, entered an order which commanded the employers to give full weight to the certification.

This report, considered by itself, might suggest—as the Board's brief indicates—that the Board had determined, for once and for all, to enforce the view that policemen must be treated as rank and file labor, in the establishment of appropriate units. That is not, however, the case. The Board's order was not observed in fact. The Board never attempted seriously to enforce it. And in

American-Hawaiian Steamship Company, 19 N.L.R.B. 623 (1940)—a report of the same case, not cited in the Board's brief here, the Board vacated and set aside its final order and dismissed the Union's complaint.

A reading of the three reports of the *Luckenbach* case will show that the policies and interpretations of the Act which it reflects are incompatible in many particulars with the principles asserted to be correct by the Board's brief here. The decision was anomalous from the beginning, and its abandonment and vacation by the

Board itself was very evidently a recognition or confession of error on the part of the Board.

III. The Respondent Raised Before the Board Its Present Contention That a Single Union Should Not Be Qualified as Exclusive Representative of Both the Police and the Rank and File, in the Otis Works.

At the first of the Board's two hearings of this case, held on April 8, 1943, the respondent was represented by Earl F. Blank, its Director of Personnel Relations (R. 2). Early in the hearing, as the only witness for the respondent, Mr. Blank read into the record a statement of its opposition to the Union's plan to represent the police (R. 5).

In his statement, he described the then effective contract of December 2, 1942, by which the Union had been recognized as exclusive representative of the entire body of rank and file labor in the Otis Works, and by which it had been agreed that foremen, "watchmen," salaried employees and nurses should be excluded from its jurisdiction (R. 5-6, and see R. 16). He declared that the respondent must be entitled, of necessity, to the single-minded loyalty of these representatives of management (R. 6):

> "These four groups occupy positions which by virtue of the character thereof necessarily render them perforce management representatives. It is evident from the above exclusions that the enumerated groups have interests so akin to that of the Corporation that it was, as late as December 11, 1942, the desire of both the Corporation and the

Union to have these people serve management's interest without other affiliation."

Having alluded to the military status of the police, he said (R. 8):

> "It is the position of this Corporation that the guards in question perform certain assigned work that is strictly representative of management, and for the reasons above assigned, it is respectfully requested that this petition be dismissed.
>
> "Trial Examiner Plost. As I understand you, you also at this time formally move to dismiss the Petition on the grounds that the unit of guards is not appropriate?
>
> "Mr. Blank. That's right."

In a second statement at the same hearing, Mr. Blank, plainly intending to illustrate his position, described an incident of divided loyalty, and resulting neglect of duty, in a plant policeman of the Bethlehem Steel Corporation (R. 11-12), its point being that no human being is likely to fulfill his obligations as such a policeman, and at the same time his obligations as a member of a rank and file union.

After the hearing, Mr. Blank filed with the Board, and it accepted as a brief (R. 52), a copy of the testimony of Joseph M. Larkin, Vice President of the Bethlehem Steel Company, submitted at a congressional hearing on April 1, 1943, and appearing on pages 161-172 in the pamphlet report of the "Hearings before the Committee on Military Affairs, House of Representatives, Seventy-Eighth Congress, First Session, on H.R. 2239, etc." The committee was considering legislation which would have prevented the union representation of supervisory agents—legislation which was shortly made

to appear unnecessary by the Board's decision of the *Maryland Drydock Company case*, (49 N.L.R.B. 633) on May 11, 1943, but which seemed most important when Mr. Larkin testified. The Committee record, filed with the Board by Mr. Blank, included the following, attributed to Mr. Larkin:

(p. 162)

"All that can be said about the inappropriateness of union membership for supervisory employees applies with even greater force when we come to consider plant guards. With the country at war, the men who guard vital steel plants, airplane factories, tank arsenals and shipyards have a grave responsibility, indeed. As you gentlemen are no doubt aware, plant guards are now members of the Auxiliary Military Police of the United States Army or the United States Coast Guard Reserve, and as such they are obligated to fulfill duties as prescribed by the President of the United States.

"Are these men to be permitted to join unions? And if they do join unions, will they not face a conflict of loyalties in the event of industrial disputes? Can a plant guard reasonably be expected to fulfill his responsibility to his employer, to faithfully patrol and protect the war production plant entrusted to his care, if his union orders him out on strike?

(p. 164)

"To further illustrate the effect of permitting the unionization of these employees, let us consider the position of the foremen. Suppose that these men who are the direct supervisors of the employees actually on the production front, join labor organ-

izations. They can either (1) joint the same union as employees, or (2) join some other union.

"If a foreman joins the same union as the men who work for him, the normal relationship between employees and management immedately disappears. When there is work to be done, someone has to direct it. It cannot be overstressed that to men in the ranks the foreman is the supervisor. When foremen join unions, supervision to a very real extent passes out of the picture."

In the Board's subsequent "Decision and Direction of Election," published on May 3, 1943, it recognized accurately the nature of Mr. Blank's objection, but nevertheless overruled it, in this language (R. 54):

"The Union already represents all production and maintenance employees of the Company under a contract dated December 2, 1942, and the employees in the unit proposed herein are specifically excluded from the benefits of the above-mentioned contract. However, the Union does not intend to merge the plant-protection employees with the unit for which it has already been recognized as the exclusive bargaining agent, but intends to bargain for them as a separate unit. We have, on several occasions heretofore, permitted the same labor organization to bargain for the production and maintenance employees and the plant-protection employees in separate units."

At the Board's second hearing in the case, held on September 28, 1943, after the election and a certification of the Union, the respondent was represented by James C. Beech, one of Mr. Blank's assistants (R. 41). Neither party offered any oral testimony, but Mr. Beech offered

several documents which plainly renewed Mr. Blank's objection. For example, he offered respondent's Exhibit 3-A, a communication to the Board which contained this language (R. 60):

> "The Corporation moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employes in all of its steel plants, * * *."

—saying, in response to a request by the Trial Examiner that he explain the significance of this Exhibit (R. 50):

> "* * * It is being introduced to clarify Respondent's present position in respect to bargaining with units composed of Plant Guards * * *."

Although the Trial Examiner was thus advised of the respondent's position, he made no express reference to it in his Intermediate Report, apparently considering that the question had been foreclosed by the Board's Decision and Direction of Election (R. 64). Nevertheless, in its exceptions to the Intermediate Report, the respondent complained of the Trial Examiner's ultimate conclusion of law—his conclusion that the Union was entitled to recognition, arguing that its application would result in a division of the loyalties of the police, of a character forbidden by the Act (R. 69):

> "* * * Plant guards, who are civilian auxiliaries to the military police, are confronted with mixed questions of duty, allegiance and responsibility to the U. S. Government, employer and labor organization. In the matter of The Maryland Drydock Company and Local No. 31 of the Industrial Union of Marine and Shipbuilding Workers of America, Cases No. R-5212 and 5214, the Board

held that supervisory employees do not constitute a unit appropriate for the purposes of collective bargaining * * *."

Finally, in the Board's Decision and Order, published on December 2, 1943—the final order now under review here, it expressly recognized and rejected the contention that a single union cannot represent both rank and file labor in such an establishment as the Otis Works, and also policemen who exercise managerial and public authority over the rank and file. Its language was general (R. 73):

"* * * The respondent has advanced no argument in support of its contentions which we have not considered and rejected in previous decisions holding that plant-protection employees may constitute appropriate units for collective bargaining under the Act."

—but its meaning was clarified by the Board's citation, as its authority for this ruling, of its own decision in a similar case arising at the respondent's Pittsburgh Works, *Jones & Laughlin Steel Corporation*, 52 N.L.R.B. 975 (1943), in which it had discussed and rejected the contention just described.

From the foregoing references to the record, it must be apparent that at every stage of the case before the Board, the respondent made clear its reliance *inter alia* upon the contention—later upheld by the Court below—that the Act forbids representation of both supervisory officers and supervised rank and file by one union.

Conclusion.

Although this Supplement to the respondent's Brief is laboriously long, its length results largely from the difficulties of digesting the Board's list of over one hundred cases, and of citing all the pages of the record at which the respondent is shown to have raised the contention of law just described, which the Board has recently (see R. 126-127) been unable to find in the case. It is hoped that, despite its length, this paper will tend to clarify the case, by showing — as it is submitted it does tend to show—that upon the facts set forth and the issues of law fairly presented by the record, this is a case of first impression, in which the Board has attempted improperly to depart from its own sound, and originally well-settled, administrative interpretation of the Act.

Respectfully submitted,

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